

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the
Commission's Own Motion into Competition
for Local Exchange Service.

Rulemaking 95-04-043
(Filed April 26, 1995)

Order Instituting Investigation on the
Commission's Own Motion into Competition
for Local Exchange Service.

Investigation 95-04-044
(Filed April 26, 1995)

**ADMINISTRATIVE LAW JUDGE'S RULING
REGARDING MOTION FOR DISPUTE RESOLUTION**

By this ruling, the November 15, 2004 motion of Pac-West Telecomm, Inc. (Pac-West) is hereby granted for resolution of an interconnection-related dispute with SureWest Telephone Company (SureWest). As discussed below, it is concluded that Pac-West has correctly interpreted the Amendment to its interconnection agreement (ICA) with SureWest.

Statement of the Dispute

Pac-West and SureWest entered into an ICA in September 2000, as approved by Decision (D.) 00-09-032 following arbitration. In D.00-09-032, the Commission determined that Pac-West was entitled to reciprocal compensation for completing calls originated by SureWest end users and delivered to Pac-West to Internet Service Providers (ISPs) in accordance with the provisions of the ICA that apply to other calls from Surewest end users to Pac-West customers.

The Federal Communications Commission (FCC) subsequently issued an order (FCC Order)¹ on April 27, 2001, establishing new rules for payment of reciprocal compensation for dial-up calls delivered to ISPs. The FCC Order, which became effective on June 15, 2001, established two limitations on the obligations of originating carriers to pay reciprocal compensation rates and an overall ceiling on the volume of traffic subject to reciprocal compensation.

Pac-West and SureWest entered into negotiations to amend provisions of their ICA to incorporate the effects of the FCC Order relating to ceilings on traffic volumes subject to reciprocal compensation. A resulting amendment was filed with the Commission and became effective 30 days later, on May 11, 2002. The pertinent provision of the Amendment establishing the traffic volume ceiling stated:

“For the year 2002, Pac-West may receive compensation, pursuant to the Agreement, for ISP-bound minutes up to a ceiling equal to the minutes for which it was compensated under that agreement in 2001, plus another ten percent growth factor.”

While both parties agreed to the Amendment language, each party interprets the language differently with respect to volume of ISP-bound minutes from 2001 used to determine the ceiling on ISP-bound minutes for payment of reciprocal compensation during 2002 and subsequent years. Pac-West interprets the Amendment as requiring that the ceiling be based upon the total actual minutes of ISP-bound traffic delivered during 2001. SureWest, however, interprets the Amendment as requiring that the ceiling be limited to the formula

¹ In the Matter of Intercarrier Compensation for ISP-Bound Traffic et al., CC Docket Nos. 99-68 and 96-98, *Order on Remand and Report and Order*, FCC 01-131 (released April 27, 2001) (FCC Order).

for compensable 2001 minutes as set forth in the FCC Order. Under that formula, reciprocal compensation payable during calendar year 2001 would be capped at a level equal to the actual minutes delivered during the first quarter of 2001, annualized to represent a 12-month period.² Thus, even if the actual ISP-bound minutes during the second-through-fourth quarters significantly exceeded the first-quarter volume, the FCC formula would limit the compensable minutes for 2001 to the first quarter volume multiplied by four to derive an annualized figure.

Based on its view that the ICA Amendment incorporated this formula for deriving the volume cap, SureWest paid reciprocal compensation to Pac-West for ISP-bound minutes attributable to the year 2002 only up to the annualized first quarter total from 2001, plus a 10% growth factor. SureWest, however, did not pay compensation for 2002 or subsequent years on any actual additional ISP-bound traffic beyond that limit.

Pac-West argues, however, that the ICA Amendment called for the use of *total actual* ISP-bound minutes for the full calendar year of 2001 in determining the ceiling of compensable minutes for 2002 and thereafter. Pac-West does not interpret the Amendment as invoking the FCC formula in determining the total ISP-bound minutes from 2001 to be used as the basis for calculating the ceiling on subsequent years' compensation.

Pac-West argues that the ICA Amendment was required to incorporate change-of-law provisions of the FCC Order. Yet, because the Amendment became effective only in May 2002, Pac-West argues that the ICA remained

² See FCC Order, ¶ 8

unchanged by the FCC Order during the full calendar year of 2001. Thus, Pac-West argues that the FCC Order did not have the effect of limiting the applicable ISP-bound minutes subject to reciprocal compensation under the ICA during 2001. Under this line of reasoning, Pac-West interprets the Amendment as calling for the 2002 ceiling to be computed based upon actual 2001 traffic volumes since the change-of-law provisions of the FCC Order had not yet been incorporated into the ICA during 2001.

SureWest claims, however, that the intent of the ICA Amendment was to implement the FCC Order's limits imposed on ISP-bound minutes, including incorporation of the ceiling on compensable 2001 minutes. SureWest argues that, by seeking compensation based upon total actual 2001 minutes (instead of only the annualized first-quarter total from 2001) Pac-West is acting in conflict with the FCC Order and contrary to the intention of the parties as identified in the ICA Amendment.

Process to Resolve the Dispute

In order to resolve the dispute, Pac-West filed a motion for dispute resolution pursuant to Section III (D) of D.95-12-056 which sets forth a four-step process for expedited resolution of disputes between telecommunications carriers. The first step of the process requires good faith efforts by the parties to resolve the dispute independently through negotiation. Pac-West claims that the parties completed this first step, but without success.

The second step calls for mediation with an ALJ. Pac-West argues that mediation here would likely be a waste of resources since the parties could not find an acceptable middle ground in previous discussions. Pac-West thus asked the Commission to waive the second step calling for mediation. SureWest filed a response on November 30, 2004, however, arguing that mediation should be

attempted before submitting the dispute for an ALJ ruling on the substantive merits.

A preliminary ALJ ruling was issued on May 10, 2005. In an effort to pursue mediation, the ALJ prescribed that each of the parties would be contacted by a representative of the Commission's alternative dispute resolution (ADR) process. The representative explained to each party the ADR process available through the Commission to mediate disputes.

The May 10, 2005 ALJ ruling directed each party to confirm a willingness to participate in mediation. Pursuit of mediation requires the mutual willingness of each party to participate. Confirmation could not be obtained from both parties, however, in agreeing to participate in mediation. Accordingly, given parties' lack of mutual willingness to participate in mediation, a subsequent ALJ ruling was issued on December 9, 2005. The ALJ directed that the process move to the next step under D.95-12-056, calling for an ALJ ruling on the merits of the dispute.

Since Pac-West had already provided a pleading setting forth its substantive arguments, the ALJ provided SureWest the opportunity to file a substantive response to the arguments of Pac-West. SureWest filed a substantive response on December 21, 2005.

Accordingly, this ruling is issued based on consideration of the merits of each party's arguments. If either party disagrees with the findings of this ruling, that party may file a formal complaint under the expedited complaint process, as set forth under the process in D.95-12-056.

Discussion

This dispute turns on the question of whether the ICA Amendment calls for compensation to be paid during 2002 based on the total volume of ISP-bound

minutes delivered during calendar year 2001, or limits compensation only to the annualized volume of ISP-bound minutes delivered during the first quarter of 2001, as defined in the FCC Order. Both parties agree as to how 2001 compensable minutes are computed under the formula of the FCC Order, but disagree as to whether that formula applies with respect to their ICA Amendment in implementing the FCC Order prospectively beginning in 2002. Under the formula established in the FCC Order, the volume of ISP-bound minutes eligible for compensation during 2001 would be limited to the first quarter actual minutes during 2001, expressed on an annualized basis. The FCC Order limits allowable minutes for 2002 to “a ceiling equal to the minutes for which it was entitled to compensation in 2001.”

The question at issue is how to interpret the ICA Amendment language calling for the retrospective application of 2001 data for calculating prospective 2002 compensation levels. Parties’ stated intent is “to modify the Agreement to incorporate the FCC’s rules and regulations promulgated in the Order on Remand.” The question, therefore, is: did the Amendment to “modify the Agreement to incorporate the FCC’s rules and regulations promulgated in the Order on Remand” mean application of the annualized ceiling on ISP-bound minutes delivered during 2001 in computing compensable minutes for 2002 and thereafter?

If one were to focus only on this quoted portion of the Amendment, a logical inference might be drawn that “incorporating” the FCC order meant applying the annualized cap on 2001 ISP-bound minutes in computing compensable minutes for 2002 and thereafter. A proper interpretation of the ICA Amendment, however, must consider the broader context of all of the Amendment, as well as the general timing by which the FCC Order was

implemented. The process of incorporating the new FCC rules must take into account the timing of the transition. In this case, the Amendment incorporated the FCC's Order on a going-forward basis beginning in May 2002. Nothing in the Amendment language, however, indicates an intention to amend the ICA on a retroactive basis to apply its provisions to the previous calendar year of 2001.

Although the FCC Order had been issued in 2001, SureWest could not immediately invoke the FCC Order's new compensation rules prior to a bilaterally negotiated amendment of the ICA. As noted by Pac-West, the change-of-law provisions in the ICA apply only when a change of law renders the ICA, or any part of it, void, or materially affects the ability of a party to perform, or when an amendment is "necessary" to reflect changes in FCC decisions or other regulatory orders.³ In this case, the parties had not yet amended the ICA during 2001, to incorporate the change-of-law provisions of the FCC Order on Remand. Accordingly, for 2001, the limitation on allowable minutes prescribed in the FCC Order did not yet apply under the ICA. Because it was only in 2002 that the parties executed amendments to reflect the change-of-law provisions of the FCC Order, Pac-West remained entitled to reciprocal compensation for the actual minutes of ISP-bound traffic during 2001.

Assuming the ICA Amendment had been written to incorporate the annualized cap for compensable 2001 minutes into the calculation of compensable minutes for 2002 in their ICA, the Amendment might have been worded as follows:

³ See Section 1.5.3 and 1.5.4 of the Interconnection Agreement, attached as Exhibit A of the Pac-West Motion.

“For 2002, Pac-West may receive compensation, pursuant to the Agreement, for ISP-bound minutes up to a ceiling equal to the minutes for which it *would have been entitled to compensation under that agreement in 2001 assuming that the Order on Remand had been applied thereto during 2001*, plus another ten percent growth factor.”

Instead of using such wording, however, the ICA Amendment defined the 2002 ceiling as being based on “the minutes for which it *was entitled to compensation* under that agreement in 2001, plus another 10% growth factor.” Because change-of-law amendments had not yet been executed during 2001, the amount for which Pac-West “*was entitled to compensation* under that agreement in 2001,” was *the actual volume* of minutes for the 12-months ending December 31, 2001. Even though a lower cap would have resulted under the formula utilizing annualized first-quarter 2001 totals, as set forth under the FCC formula, that formula did not take effect until the ICA was amended in 2002 to incorporate *prospectively* the provisions of the FCC Order.

Accordingly, because the Amendment was not executed until 2002, the FCC formula did not apply in determining the compensation due for calendar year 2001. Therefore, the Amendment cannot reasonably be interpreted as basing the ceiling on ISP-bound minutes on the annualized 2001 total, as argued by SureWest. The more appropriate interpretation of the Amendment is that the 2002 ceiling is based on the actual volume of 2001 ISP-bound minutes. The Pac-West interpretation is the only one that creates consistency in applying both the FCC Order and the Amendment, taking into account the timing of the transition.

It is therefore concluded that Pac-West was entitled to compensation on the total ISP-bound minutes during 2001, even after the FCC Order had been issued. Accordingly, the cap on compensable traffic for 2002 and thereafter, as

referenced in the ICA Amendment, is properly interpreted as incorporating the total actual minutes delivered during 2001. This interpretation does not conflict with the FCC Order but merely references data from a point in time (i.e., calendar year 2001) before the effects of the FCC Order had been incorporated into the ICA.

IT IS RULED that:

1. The motion of Pac-West Telecomm, Inc. (Pac-West) for expedited dispute resolution is hereby granted, with issuance of a ruling on the merits of parties' substantive arguments.

2. The dispute is decided in favor of Pac-West, based on its position that the contract amendment calls for the use of actual minutes from 2001, rather than being limited to an annualization of minutes from the first quarter of 2001.

3. If a party disagrees with the findings of this ruling, that party may file a formal complaint under the process set forth in Section III (D) of Decision 95-12-056.

Dated January 23, 2005 in San Francisco, California.

/s/ THOMAS R. PULSIFER

Thomas R. Pulsifer
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached Administrative Law Judge's Ruling Regarding Motion for Dispute Resolution on all parties of record in this proceeding or their attorneys of record.

Dated January 23, 2006, at San Francisco, California.

/s/ ELIZABETH LEWIS
Elizabeth Lewis

N O T I C E

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If specialized accommodations for the disabled are needed, e.g., sign language interpreters, those making the arrangements must call the Public Advisor at (415) 703-2074, TTY 1-866-836-7825 or (415) 703-5282 at least three working days in advance of the event.